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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

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AZ CORP COMMISSION
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IN THE MATTER OF

INTERSECURITIES, INC.
570 Carillon Parkway
St. Petersburg, FL 33716-1202
CRD #16164

GREGORY RUSSELL BROWN and JANE
DOE RUSSELL, husband and wife
16417 South 15th Drive
Phoenix, AZ 85045
CRD #2233684

Respondents.

DOCKET NO. S-03482A-03-0000

**INTERSECURITIES, INC.'S MOTION
FOR JURY TRIAL**

Respondent InterSecurities, Inc. ("ISI") submits its Motion for Jury Trial¹ pursuant to Section 23, Article 2 of the Arizona Constitution, Rule 38 of the Arizona Rules of Civil Procedure and Arizona Administrative Code R14-3-101. This Motion is supported by: (i) the attached Memorandum of Points and Authorities; and (ii) the Commission's entire file in this matter.

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¹ If the Commission is unable to empanel a jury, ISI respectfully requests that the Commission direct the Securities Division to refile this matter in Maricopa County Superior Court.

1 RESPECTFULLY SUBMITTED this 29th day of August, 2003.

2 FOWLER WHITE BOGGS BANKER P.A.
3 Burton W. Wiand
4 501 East Kennedy Blvd., Suite 1700
5 Tampa, Florida 33602

6 AND

7 ROSHKA HEYMAN & DeWULF, PLC

8 By 
9 Alan S. Baskin
10 Laura Schoeler
11 One Arizona Center
12 400 East Van Buren Street, Suite 800
13 Phoenix, Arizona 85004

14 Attorneys for Respondent
15 InterSecurities, Inc.

16 **MEMORANDUM OF POINTS AND AUTHORITIES**

17 **I. INTRODUCTION AND SUMMARY OF ARGUMENT.**

18 The Arizona Corporation Commission ("Commission") Securities Division (the
19 "Division") has filed a Notice of Opportunity for Hearing Regarding Proposed Order to Cease and
20 Desist, for Restitution, for Administrative Penalties, for Revocation and/or Suspension, and for
21 other affirmative relief (the "Notice"). The Division's purported request for "restitution" pursuant
22 to A.R.S. § 44-2032 and administrative penalties of up to \$5,000 for each violation of the
23 Securities Act pursuant to A.R.S. § 44-2036 amounts to a request for a severe penalty. A severe
24 penalty may not be imposed without a jury trial. Therefore, ISI is entitled to a jury trial in the
25 above captioned matter on the issues raised in the Notice.

26 ISI is a full service investment firm with more than 2,500 registered representatives
27 nationwide. Its financial professionals own and operate their own businesses, helping people meet

1 their investment objectives through a complete array of financial products, including stocks,
2 bonds, mutual funds, variable annuities, and insurance products. It has been a registered securities
3 dealer in Arizona since 1985. It has never previously been the subject of a disciplinary action by
4 the Commission.

5 Gregory Brown was a registered representative with ISI from August 18, 1995 through
6 October 19, 2001 for the sole purpose of selling securities. Brown's primary business was
7 operating an insurance agency, Financial Benefits Group, Inc. ("FBG"), through which he sold the
8 pay telephones at issue. This agency was not an office or branch office of ISI. While Brown was
9 associated with ISI, he was licensed as an insurance salesman in Arizona.
10

11 On or about April 19, 1999, Brown sought approval from ISI to sell pay telephones offered
12 by ETS Payphones, Inc. ("ETS") and Phoenix Telecom, LLC ("Phoenix") as an outside business
13 activity through his insurance agency, FBG. ETS and Phoenix sold coin-operated telephones in
14 units which included a telephone and an option to self-manage the phone or lease the phone back
15 to the company for management. Brown presented Rod Tidwell, Assistant Vice President of ISI's
16 Compliance Department at the time, with due diligence he had conducted on the companies,
17 including marketing and offering documents relating to ETS and Phoenix, and he answered
18 questions that Mr. Tidwell had regarding the products. Mr. Tidwell had been a compliance officer
19 with ISI since October 1995. At the time, Mr. Tidwell had been licensed in the industry since
20 1956 and had served in various supervisory capacities for at least 18 years.
21

22 Mr. Tidwell asked Brown to contact the Division to obtain more information about the
23 companies. Brown called the Division and was informed that ETS and Phoenix and their affiliated
24 leasing companies had a clean record and that the Division did not have a problem with any of the
25 companies. After receiving assurances that the Division did not consider these pay telephones to
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1 be securities, Mr. Tidwell made the reasonable determination that the pay telephones were not
2 securities and approved the Outside Business Activity Request.

3 Brown offered the payphones to individuals through his independent insurance agency,
4 FBG, not through ISI. ISI had no involvement in the offers or sales of these pay telephones in any
5 manner. Further, ISI did not receive any remuneration of any kind from these sales. Nor did it
6 benefit from the telephone transactions. It had no communications with Mr. Brown's customers
7 regarding these products. Moreover, Brown fully disclosed to each purchaser that he was acting
8 on behalf of organizations other than ISI in connection with these transactions.
9

10 According to the Division, Brown sold \$2,752,850 in pay telephones to 49 investors. ISI
11 did not receive one penny from these sales, yet the Division seeks an order requiring ISI to pay
12 \$2.75 million to the 49 investors.

13 II. LAW AND ARGUMENT.

14 A. The Arizona Constitution Guarantees ISI's Right to a Jury Trial.

15 Section 23, Article 2 of the Arizona Constitution guarantees ISI's right to a jury trial.
16 Specifically, it provides that "[t]he right of trial by jury shall remain inviolate." Ariz. Const. Art. 2
17 §23. While this does not create or extend the right to a trial by jury, it guarantees the preservation
18 of the right as it existed at common law when the Arizona Constitution was adopted. Rothweiler
19 v. Superior Court, 100 Ariz. 37, 41, 410 P.2d 479, 482 (1966); Hoyle v. Superior Court, 161 Ariz.
20 224, 227, 778 P.2d 259, 262 (Ct. App.1989).
21

22 Article 15 of the Arizona Constitution created the Commission as a separate branch of
23 government. Qwest Corp. v. Kelly, 204 Ariz. 25, 29, 59 P.3d 789, 793 (Ct. App. 2002) (citing
24 Arizona Corporation Commission v. State ex rel. Woods, 171 Ariz. 286, 290, 830 P.2d 807, 811
25 (1992)). The Commission is unique from other administrative agencies in that it has executive,
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1 legislative and judicial powers. Owest Corp., 204 Ariz. at 29, 59 P.3d at 793 (quoting Woods, 171
2 Ariz. at 291, 830 P.2d at 812).

3 The Arizona Supreme Court has held that “[t]he Commission exercises its executive,
4 administrative function in adopting rules and regulations, its judicial jurisdiction in adjudicating
5 grievances, and its legislative power in ratemaking.” Woods, 171 Ariz. at 291, 830 P.2d at 812.
6 Thus, when the Commission conducts the hearing in this matter, it will be exercising its judicial
7 jurisdiction, not an executive function as other administrative agencies. Cf. Meyers v. Chapman
8 Printing Co., 840 S.W.2d 814 (Ky. 1992) (holding decision making performed by an
9 administrative agency is an executive function to which the right to trial by jury does not attach).
10

11 The framers of the Arizona Constitution did not include any provision limiting or removing
12 the right to a jury trial before the Commission. If the framers intended to limit the right to jury
13 trial to exist only before the courts, the framers would have included such a provision in the
14 Constitution at the same time it preserved the right to trial by jury and created the Commission.
15 Since the Commission is empowered to act in a judicial capacity much like a court, it follows that
16 the right to a jury trial preserved by Section 23, Article 2 of the Arizona Constitution applies to
17 hearings before the Commission.
18

19 Further, there is no comparable rule, provision or statute limiting the right to a jury trial
20 before the Commission. In the absence of a rule, the Commission must follow the Arizona Rules
21 of Civil Procedure. A.A.C. R14-3-101(A). Thus, the Commission must follow Rule 38 of the
22 Arizona Rules of Civil Procedure. Like Section 23, Article 2 of the Arizona Constitution, Rule
23 38(a) provides that “[t]he right to trial by jury shall be preserved inviolate to the parties.” Ariz.
24 Rule Civ. Pro. Rule 38(a).
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1 The right to a jury trial, preserved by both Section 23, Article 2 of the Arizona Constitution
2 and Rule 38 of the Arizona Rules of Civil Procedure, applies to actions before the Commission.
3 Where a right to a jury trial exists, it must be jealously guarded and preserved. Campbell v.
4 Superior Court, 186 Ariz. 526, 528 n.4, 924 P.2d 1045, 1047 n.4 (Ct. App. 1996). The right to a
5 jury trial in Arizona “in any case is a most substantial right and, where it has been given its
6 observance should be rigidly enforced.” Brown v. Greer, 16 Ariz. 215, 221, 141 P. 841, 843
7 (1914), superseded by statute. Moreover, in discussing the right to a jury trial, the Arizona
8 Supreme Court has held, “Fundamental rights should not depend upon an arbitrary choice as to the
9 court in which they are instituted.” Rothweiler v. Superior Court, 100 Ariz. 37, 47, 410 P.2d 479,
10 486 (1966).

12 **B. The Commission May Not Impose a Severe Penalty Without Granting ISI the**
13 **Right to a Jury Trial.**

14 **1. Legal Standard for When a Party is Entitled to a Jury Trial.**

15 As set forth above, nothing in the Arizona Constitution limits a party’s right to a jury trial
16 in appropriate Commission cases. The next inquiry is whether this is such a case. The answer is
17 “yes.”

18 In Rothweiler v. Superior Court, 100 Ariz. 37, 410 P.2d 479, (1966), the Arizona Supreme
19 Court set forth three circumstances when a defendant will be found to have a right to a jury trial:
20 (1) when the defendant is exposed to a severe penalty; (2) when the act involves moral turpitude;
21 and (3) when the offense has traditionally merited a jury trial under common law. The existence of
22 any one of these circumstances has been held to warrant a jury trial. State v. Harrison, 164 Ariz.
23 316, 317, 792 P.2d 779, 780 (Ct. App.1990), cert. denied, 498 U.S. 1093, 111 S.Ct. 979 (1991).

24 Rothweiler held that “[t]he severity of the penalty must be considered in determining
25 whether a violation of law, in other respects trivial and not a crime at common law, must be
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1 deemed so serious as to be comparable with common-law crimes, and thus to entitle the accused to
2 the benefit of a jury trial prescribed by the Constitution.” Rothweiler, 100 Ariz. at 43, 410 P.2d at
3 483-84 (quoting District of Columbia v. Clawans, 300 U.S. 617, 57 S.Ct. 660 (1937)) (internal
4 quotations and citations omitted). Here, the Division has requested that ISI potentially pay over \$3
5 million in “restitution” and administrative penalties. ISI, however, never received anything from
6 the pay telephone transactions at issue. In essence, the Division wants ISI to pay over \$3 million
7 for conduct in which it took no part, nor received any benefit.

8
9 **2. The Division’s Request for Restitution is Tantamount to a Request for a
10 Severe Penalty, Therefore Entitling ISI to a Trial by Jury.**

11 The Division has requested that the Commission order ISI to make restitution, pursuant to
12 A.R.S. § 44-2032. The Division has alleged that Brown solicited approximately \$2,752,850 from
13 49 investors. Accordingly, the Division’s request for “restitution” means that ISI may be ordered
14 to pay the entire \$2,752,850, despite never having received a penny from Brown’s telephone sales.

15 ISI received no remuneration from Brown’s pay telephone sales. Nor did any benefit inure
16 to ISI, either directly or indirectly. Brown conducted the pay telephone sales as an outside
17 business activity through his independent insurance agency. ISI did not exercise any control over
18 this activity, nor could it have, since it did not possess the power to control this activity. ISI did
19 not receive anything from Brown’s sales. Requiring ISI to pay for Brown’s conduct would be
20 punitive, not remedial. “Even the willful wrongdoer should not be made to give up that which is
21 his own; the principle is disgorgement, not plunder.” Dobbs, Dan B., Handbook on the Law of
22 Remedies, §4.5(3), Ch. 4, p.435 (2d 1993).

23
24
25 The United States Supreme Court has held that “[r]estitution is limited to restoring the
26 status quo and ordering the return of that which rightfully belongs” to the plaintiffs. Tull v. United
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1 States, 481 U.S. 412, 424, 107 S.Ct. 1831 (1987) (quoting Porter v. Warner Holding Co., 328 U.S.
2 395, 402, 66 S.Ct. 1086, 1091 (1946)) (internal quotations omitted). It is a remedy primarily
3 designed to deprive the wrongdoer of his unjust enrichment. Hateley v. SEC, 8 F.3d 653, 655 (9th
4 Cir. 1993); SEC v. First City Financial Corp., Ltd., 890 F.2d 1215, 1231 (D.C. Cir. 1989).

5 Restitution and disgorgement are one and the same; an action for disgorgement is a remedy
6 only for unjust enrichment. Tull, 481 U.S. at 424, 107 S.Ct. at 1839. Ordering ISI to pay the \$2.7
7 million others received from investors would not restore the status quo nor would it deprive the
8 wrongdoer of his unjust enrichment. It would allow others to potentially remain in possession of
9 their unjust enrichment while depriving ISI of its rightfully earned money. "Restitution" here
10 would only serve as punishment.

12 Moreover, the D.C. Circuit Court of Appeals has held that to avoid using disgorgement
13 punitively, the SEC must distinguish between legally and illegally obtained profits. First City
14 Financial Corp., Ltd., 890 F.2d at 1231; *see also* SEC v. Blatt, 583 F.2d 1325, 1335 (5th Cir.1978)
15 (power to order disgorgement extends only to amount with interest by which defendant profited
16 from his wrongdoing; any more would constitute penalty); SEC v. Collins, 2003 WL 21196236, *6
17 (N.D. Ill. May 21, 2003) (absent some evidence of personal involvement in wrongdoing,
18 disgorgement would be punitive); Commodities Futures Trading v. Heffernan, --F.Supp.2d --,
19 2003 WL 21783760, *2 (S.D. Ga. Aug. 4, 2003) (disgorgement above profit and interest from
20 wrongdoing constitutes penalty assessment); United States v. Perez, 902 F.Supp. 1318, 1321
21 (D.Colo. 1995) ("in the securities fraud context, disgorgement merely deprives the defendant of
22 wrongfully obtained proceeds, returning the wrongdoer to the status quo before any wrongdoing
23 occurred, while punishment alters the status quo before the unlawful activity took place"); SEC v.
24 Lorin, 869 F.Supp. 1117, 1123 (S.D.N.Y. 1994) (liability not limited to damage caused by
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1 wrongdoer or profits he wrongfully obtained is punitive not remedial); Hateley, 8 F.3d at 656
2 (disgorgement limited to “the means by which the petitioners are required to remedy the unjust
3 enrichment”). Accordingly, the Division’s restitution claim is a punitive use of the restitution
4 remedy because ISI was not unjustly enriched. ISI is entitled to a jury trial.

5 **3. The Division’s Request that ISI Pay Administrative Penalties Amounts**
6 **to a Severe Penalty; Therefore, ISI is Entitled to a Trial by Jury.**

7
8 In addition to \$2,752,850 in purported “restitution” the Division requests that ISI be
9 penalized for its actions. The Division has requested the Commission impose an administrative
10 penalty of up to \$5,000 for each violation of the Securities Act, pursuant to A.R.S. § 44-2036. The
11 Division has alleged that two sections of the Securities Act were violated. If the Division
12 establishes these two sections were violated with respect to each of the 49 investors, ISI may face a
13 penalty of up to \$490,000.

14 When the Division’s request for such a substantial penalty is combined with its request that
15 ISI pay \$2,752,850 from its own funds when it was never unjustly enriched, it is apparent that the
16 Division’s purpose is punitive. The Division seeks to punish ISI.

17
18 Arizona courts recognize that civil penalties can constitute punishment for purposes of the
19 constitutional prohibition against double jeopardy. See, e.g., Jardanowski v. Industrial Com’n of
20 Ariz., 197 Ariz. 246, 250 n.11, 3 P.3d 1166, 1170 n.11 (App.2000) (characterization of a sanction
21 as civil as opposed to criminal for purposes of double jeopardy is important, but “is no longer
22 dispositive”) (citations omitted); Martin v. Superior Court, 195 Ariz. 293, 302-08, 987 P.2d 779,
23 788-94 (App. 1999) (setting forth analysis for when a statutory sanction is civil or criminal).

24
25 If a Commission penalty can serve as punishment for purposes of double jeopardy, it
26 logically follows that Commission penalties can also serve as punishment for purposes of a
27

1 respondent's right to a jury trial. Once again, ISI was not enriched by the pay telephone
2 transactions. Consequently, the remedies sought have become punitive in nature, similar in effect
3 to a crime at common law. ISI is entitled to a jury trial on the issues raised in the Notice.

4 C. **The Division's Action is Analogous to an Action at Common Law; Therefore**
5 **ISI is Entitled to a Jury Trial.**

6 Rothweiler provides that a defendant is entitled to a jury trial if the offense has traditionally
7 merited a jury trial under common law at the time the Arizona Constitution was adopted.
8 Rothweiler, 100 Ariz. at 42, 410 P.2d at 483. Similarly, the Seventh Amendment of the United
9 States Constitution grants a defendant a right to a jury trial if one existed at common law. Tull v.
10 United States, 481 U.S. 412, 417, 107 S.Ct. 1831, 1835 (1987) (holding jury trial required on
11 merits where action analogous to suit at common law).
12

13 The Supreme Court has construed the language of the Seventh Amendment to require a
14 jury trial on the merits in actions analogous to "Suits at common law." Tull, 481 U.S. at 417, 107
15 S.Ct. at 1835. Tull involved a suit brought by the federal government against a real estate
16 developer pursuant to the Clean Water Act for dumping fill on wetlands. The government sought
17 to impose over \$22 million in monetary penalties against a company for violations of the Clean Air
18 Act. Id. at 420, 107 S.Ct. at 1836. Similar to ISI, Tull did not receive any profits on two pieces of
19 property where he allegedly violated the relevant statutes. Id. at 423, 107 S.Ct. at 1838. Despite
20 acknowledging this, the District Court denied the real estate developer's request for jury trial and
21 imposed civil penalties and injunctive relief. Id.
22

23 On appeal, the Fourth Circuit Court of Appeals affirmed and certiorari was granted.
24 Reversing and remanding the case, the United States Supreme Court held that the Seventh
25 Amendment of the United States Constitution required that the real estate developer's request for
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1 jury trial be granted to determine his liability, but that the trial court rather than the jury should
2 determine the amount of the penalty if liability was found. Tull, 481 U.S. at 427, 107 S.Ct. at
3 1840.

4 The Court stated that prior to the adoption of the Seventh Amendment a jury trial was
5 customary in common law suits brought in English law courts, whereas actions that are analogous
6 to 18th-century cases tried in courts of equity or admiralty do not require a jury trial. Id. (citing
7 Parsons v. Bedford, 3 Pet. 433 (1830)). The Court stated that its analysis “applies not only to
8 common law forms of action, but also to causes of action created by congressional enactment.”
9 Tull, 481 U.S. at 417, 107 S.Ct. at 1835.
10

11 Courts must consider two factors in determining whether a cause of action is similar to a
12 cause of action tried in courts of law or courts of equity or admiralty: (1) the nature of the action,
13 and (2) the nature of the remedy sought. Id. Applying the first factor, the Court compared the
14 statutory action to 18th-century actions brought in the courts of England prior to the merger of the
15 courts of law and equity. Id. at 417, 107 S.Ct. at 1835. The Court held that actions by the
16 government for the recovery of civil penalties under statutory provisions were traditionally viewed
17 as actions in debt requiring a jury trial. Id. at 418-19, 107 S.Ct. at 1836. The essential function of
18 an action in debt, according to the Court, was to recover money owed under a variety of statutes or
19 under the common law. Id. at 421, 107 S.Ct. at 1837.
20

21 The second inquiry required the Court to analyze the nature of the remedy sought to
22 determine whether it was legal or equitable in nature. Id. at 417-18, 107 S.Ct. at 1835. The Court
23 emphasized that characterizing the relief sought is more important than finding a precisely
24 analogous common-law cause of action in determining whether the right to a jury trial attached.
25 Id. at 421, 107 S.Ct. at 1837. The Court rejected an argument by the government that both the
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1 cause of action and remedy must be legal in nature before the right to a jury trial attaches, stating
2 instead, "Our search is for a single historical analog, taking into consideration the nature of the
3 cause of action and the remedy as two important factors." Id. at 421, n.6, 107 S.Ct. at 1837, n.6.

4 The Court found the action against Tull to be "clearly analogous to the 18th-century action
5 in debt." Id. at 420, 107 S.Ct. 1836. Although the government tried to characterize the penalties
6 as being similar in nature to disgorgement, the Court found this to be a poor analogy. It held that
7 an action for disgorgement is a remedy only for restitution, which is just a more limited form of
8 penalty than a civil fine. Id. at 424, 107 S.Ct. at 1839. The Court stated that restitution is limited
9 to restoring the status quo and ordering the return of that which rightfully belongs to another. Id.
10 (quoting Porter v. Warner Holding Co., 328 U.S. 395, 402, 66 S.Ct. 1086, 1091 (1946)).

12 The Court concluded that the District Court intended not to disgorge profits, but to impose
13 punishment. 481 U.S. at 424, 107 S.Ct. at 1839. Because this type of relief was traditionally
14 available only in a court of law, Tull was entitled to a jury trial on demand. Id.

15 The facts here are indistinguishable from Tull. As in Tull a government agency seeks
16 penalties and injunctive relief. As in Tull the Division does not seek restitution or disgorgement
17 from ISI because ISI has nothing to disgorge. Rather, the Division seeks to punish ISI by having it
18 pay money that was raised by and paid to others. Accordingly, the Division's claims parallel
19 common law claims and implicate ISI's jury trial rights. Because this type of relief is available
20 only in a court of law, ISI is entitled to a jury trial on demand. 481 U.S. at 424, 107 S.Ct. at 1839.

22 Finally, relying on Tull, commentators have concluded that a defendant in an action by the
23 SEC seeking a money penalty has a right to a jury trial. 1 Securities Prac. Fed. & State
24 Enforcement § 6:9 (2002). It follows, therefore, that ISI has a right to a jury trial.
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1 **III. CONCLUSION.**


2 The Division seeks to impose severe penalties against ISI. Before any penalties can be
3 imposed, ISI is entitled to a jury trial. ISI is also entitled to a jury trial because the Division's
4 claims have traditionally merited a jury trial under the common law. ISI respectfully requests that
5 the Commission grant ISI's Motion for a Jury Trial. If the Commission is unable to empanel a
6 jury, ISI respectfully requests that the Commission direct the Securities Division to refile this
7 matter in Maricopa County Superior Court.

8
9 RESPECTFULLY SUBMITTED this 29th day of August, 2003.

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14 AND

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1 ORIGINAL and thirteen copies of the foregoing
2 hand-delivered this 29th day of August, 2003 to:

3 Docket Control
4 Arizona Corporation Commission
5 1200 West Washington Street
6 Phoenix, AZ 85007

7 COPY of the foregoing hand-delivered
8 this 29th day of August, 2003 to:

9 Matthew Neubert
10 Director of Securities
11 Securities Division
12 Arizona Corporation Commission
13 1300 W. Washington Street
14 Phoenix, AZ 85007

15 Philip J. Dion III
16 Administrative Law Judge
17 Arizona Corporation Commission
18 1200 W. Washington Street
19 Phoenix, AZ 85007

20 COPY of the foregoing mailed
21 this 29th day of August, 2003 to:

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